87-1553

No.: _____

IN THE

Supreme Court of the United States

October Term, 1987

DOMINIC CATALDO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner Cataldo was denied the effective assistance of counsel by his counsel's conflict of interest, and subsequent physical and mental incapacity.

2. Whether the District Court erred by amending the indictment to include a predicate act in the RICO counts which was not submitted to the Grand Jury.

3. Other questions adopted in Point III of this Petition which are specifically set forth in the Petition of Petitioners Carmine Persico, Alphonse Persico, John DeRoss and Anthony Scarpati, #87-1323.

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PRELIMINARY STATEMENT

This is an appeal by Petitioner, Dominic Cataldo, from a judgment of the United States Court of Appeals for the Second Circuit, decided December 9, 1987, with a thirty-seven page Opinion, which affirmed a judgment of

the United States District Court for the Southern District of New York (Honorable John F. Keenan), rendered on November 13, 1986, convicting Petitioner of the crimes of RICO, and RICO Conspiracy, pursuant to 18 United States Code, Sections 1961, and 1962 (c) and (d). Petitioner was sentenced to fourteen years incarceration.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, §1251. The Opinion of the United States Court of Appeals for the Second Circuit, reprinted at length in the Petition of Carmine Persico, Docket Number 87-1123, is hereby incorporated.

STATUTES INVOLVED

18 U.S.C. §1961 Definitions

(4) "enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1962 Prohibited Activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

21 U.S.C.§812 Schedules of Controlled Substances

(1) Schedule I.
(A) The drug or other substance has a high potential for abuse.
(B) The drug or other substance has no currently accepted medical use in treatment in the United States.
(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. §841 Prohibited Acts A

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced, as follows:

(1)(A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of $25,000 or both....

21 U.S.C. §846 Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §173

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction * * *.

21 U.S.C. §174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any narcotic drug

after being imported or brought in, knowing same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned * * *.

FACTS

The indictment (84 CR 809), which was filed on October 23, 1984 and later superseded on April 14, 1985, charged the various defendants with violating RICO under two separate but related theories, both substantively under subsection (c) and by conspiracy under subsection (d).

Various conspiracies were merged into the central RICO enterprise and conspiracy by the government's contention that they were all acts and conspiracies included in the single enterprise "known as the 'Colombo Organized Crime Family of La Cosa Nostra'."

Many of the "pattern acts" were old charges for which the respective defendant was previously prosecuted, entered pleas of

guilty and were sentenced, and previously uncharged crimes occurring up to fifteen years prior to the indictment herein.

The pattern of racketeering in this case ran the gamut from labor racketeering to running gambling business, bribing of public officials, extortion, loan sharking and federal narcotics violations. Petitioner Cataldo, however, was named in only four of the fifty-six acts charged. In Count one, these charged acts are as follows:

(1) Racketeering Act 42 charged that from on or about July 13, 1978 to September, 1978, Petitioner Cataldo and Andrew Russo paid $5,000 to a public official to improperly use his official position to stop a criminal income tax prosecution against petitioner (18 U.S.C. §201(b) (3)).

(2) Racketeering Act 45 charged that from October 1981 to September 1982, Petitioner Cataldo and several co-defendants gave, offered, and promised $20,000 to a public official with intent to induce that official to arrange the transfer of co-defendant Carmine Persico from one federal prison facility to another in violation of 18 U.S.C. §210(B) (3).

(3) Racketeering Act 46 accused Petitioner Cataldo of giving, offering, and promising a sum of money to a public official

between November 1981 and September 1982 to induce that official to cause his transfer from one federal prison facility to another and to cause petitioner's sentence to be reduced and to reduce his custody classification while incarcerated, all in vilation of 18 U.S.C. §201(b) (3).

(4) Racketeering Act 56 charged that between August 1970 and October 27, 1970, petitioner and others with feloniously buying and selling "and otherwise dealing in narcotics and other dangerous drugs in violation of Title 21 §§812, 841(A) (1), 841(A) (1) (A), and 846." More specifically, the indictment charged in Racketeering Act 56(a) that petitioner conspired to possess and distribute an unspecified amount of heroin; and in Racketeering Act 56(b) that petitioner possessed with intent to distribute and distributed a total of threekilograms of heroin on six separate occasions between August and the end of October 1970 all in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A).

Count Two of the superseding indictment charged each of the defendants, including Petitioner Cataldo, named in the RICO Conspiracy with the substantive violation of knowingly conducting and participating in the affairs of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).

The indictment, using the predicate acts

described in Count One, then charged Petitioner Cataldo's various co-defendants with an additional forty-nine substantive violations of law. Petitioner Cataldo was not charged in any so called substantive counts, therefore, he was only charged in the RICO conspiracy count (1962 (d)) in Count One and the RICO substantive count in Count Two (1962 (c)).

The facts of these "pattern acts" are depicted as follows:

ANNACHARICO CONSPIRACY
Racketeering Act 42

(1) Background

Between 1977 and early 1980, Richard Annacharico was a Special Agent of the Internal Revenue Service assigned to the Brooklyn Organized Crime Strike Force. In February 1977, through the connivance of an informant, he met Victor Puglisi. In May 1977, he became an undercover operative in

the sense that he appeared to be a corrupt IRS Agent and in that role it was decided that whenever possible all of his conversations would be recorded.

As part of their supposed corrupt relationship, Annacharico promised to "fix" tax cases then pending against Puglisi's friends.

(2) The Cataldo Tax Case

On July 13, 1978, Puglisi met with Annacharico wherein Puglisi proposed the fixing of two new tax cases, one of which involved Petitioner Cataldo. After a telephone conversation on July 14, 1978 about the Cataldo matter, on July 18th, Puglisi telephoned Annacharico and informed him that his "associates" wanted to see the papers on Cataldo's tax case.

On July 20, 1978, on the telephone Puglisi told Annacharico that he would get $5,000 for fixing the Cataldo case.

There was an exchange of several documents for Cataldo's signature that were returned either unsigned or "signed" by someone. It was never proven and the witness Annacharico conceded that he possessed no information nor proof that Cataldo signed any documents. Nevertheless, Annacharico caused a closing letter for the investigation to be issued.

After a discussion with Puglisi about the Cataldo case, Annacharico received $3,000 from Puglisi and Puglisi kept the remaining $2,000 for himself.

On March 5, 1981, Petitioner Cataldo pleaded Guilty to a portion of 81 CR 24 (EDNY) which alleged that between July 13, 1978 and September 15, 1978, he and others conspired to bribe an IRS Agent to influence his decision on a matter and to bribe the IRS to impede a criminal investigation of the IRS. In his words, petitioner gave money to

Puglisi "to care of" my tax case.

IANNUZZI CONSPIRACY
Racketeering Act 45-46

(1) Background

One of the central themes of this prosecution was the notion that the enterprise had the ability to corrupt public officials. At the core of this theory was the narrative of a malcontent and admitted perjurer named Joseph "Joe Dogs" Iannuzzi. Iannuzzi was the witness-in-chief against petitioner.

Iannuzzi described his background and various criminal activities while associated with one Thomas Agro, wherein along the way he met and became friendly with petitioner. He told of working for Agro and as such learning of the infrastructure of Agro's association with an organized crime group that he referred as "the Gambino Family."

By January 1981, Iannuzzi's relationship

with Agro had soured over some bad loanshark deals to the point that he was severely beaten by Agro and two others in a Florida pizza parlor. During his extended convalescence, he was contacted by the FBI. After some initial negotiation, he agreed to cooperate with them in connection with investigations into organized crime in Miami and New York. Over the next one and a half years, he operated undercover and tape recorded hundreds of conversations using body recorders and telephone recording appartus.

(b) Cataldo Move

On June 6, 1981, Iannuzzi went to Utica, New York on vacation. There he called Petitioner Cataldo and the two agreed to meet in Lake George. While there, Cataldo told Iannuzzi that he had been convicted of a crime and designated by the US Bureau of Prisons to Lewisburg Camp. He asked Iannuzzi if Iannuzzi was still in touch with Nina from

Washington, DC. Nina had worked for the Sergeant-at Arms in the US Senate. Iannuzzi told him he still knew her, but he now had his own connection in Washington. That connection was, of course, the FBI for whom he was now working. Iannuzzi maintained at trial that he believed that the FBI would help his friend as they were not interested in nor investigating Cataldo.

Petitioner asked Iannuzzi if he could get him to an easier prison, such as the one at Lake Placid. He also asked if Iannuzzi could assist in getting his sentence reduced. Shortly thereafter, Iannuzzi asked the FBI for help and they accommodated him by arranging for petitioner's redesignation. Iannuzzi then told petitioner that he would serve his sentence at either Lake Placid or Allenwood.

(c) Persico Move

On August 8, 1981 Ianuuzzi attended

Cataldo's son's wedding in Brooklyn. During the reception, petitioner introduced him to a number of individuals including "Donny Shacks" Montemarano, who he described as Cataldo's captain. According to Iannuzzi, petitioner told Montemarano of Iannuzzi's good deed and his long relationship with Thomas Agro. Montemarano then told a number of others gathered at the wedding of Iannuzzi's favor for petitioner.

On August 9, 1981, Iannuzzi spoke with Agro who in turn told him he had heard of Iannuzzi's favor for petitioner and asked if Iannuzzi's contact was available to be used again. Iannuzzi agreed that he could. On October 2, 1981, Cataldo called Iannuzzi and said "Donny Shacks" needed a favor, and they agreed to talk about it the following Sunday. In another unrecorded conversation, Iannuzzi claimed that petitioner asked if Iannuzzi's source could move petitioner's boss, Carmine

Persico, implying that money was no object.

Several days later, petitioner called Iannuzzi from Allenwood Prison. During the course of the conversation, Iannuzzi promised to get his source to help move Persico to Danbury Prison and to reduce petitioner's sentence. Thereafter, Iannuzzi spoke with the FBI who told him that they could arrange the move to Danbury.

On November 10, 1981, in an unrecorded conversation, petitioner called Iannuzzi wherein it was asserted that Iannuzzi told petitioner that Persico could be moved but the cost would be $40,000. Petitioner asked if the amount could be lessened. On November 15th, the dialogue with respect to moving Persico continued, when Joey Cataldo (petitioner's brother) told Iannuzzi that the "Colombo's" wouldn't pay the $40,000, especially since Cataldo's move was free.

Subsequently, Iannuzzi told petitioner

that the move of Persico was already in the works and the "Colombo's" were refusing to pay. Petitioner stated he could do nothing about it and suggested a reduction in the cost. Additionally, petitioner complained about Iannuzzi and his source doing anything prior to any agreement being reached. In December, Iannuzzi flew to New York and met with Agro. During their conversation, Agro expressed disbelief that the "Colombo's" had reneged and that the "Gambino's" needed a favor from his source. Iannuzzi told him that if payment of the money was not made before February 1, 1982 that Persico would be moved from Danbury to another prison.

Several conversations were had regarding the above and the non-payment resulting in Iannnuzzi informing Agro that nothing could be done for the "Gambino's" because the "Colombo's" had not met its obligation. Enraged, Agro suggested that Cataldo be moved

to punish the "Colombo's" and let them know which group had the connection.

Thereafter, Cataldo was moved to Ashland, Kentucky and Cataldo submitted that it was Persico's fault that the money wasn't paid. In mid-April 1982, Iannuzzi, while in New York, met with Agro and Joey Cataldo wherein he demanded that Joey pay $20,000 for the Persico move to Danbury by the following Saturday or else Persico would be moved to another prison. Two days later, April 17, 1982, Joey Cataldo paid $20,000 to Iannuzzi.

In August 1982, Agro told Iannuzzi that Persico was moved from Danbury to the West Coast. Agro said it was more important that Persico be returned to Danbury than moving Cataldo back. Subsequently, Iannuzzi informed Agro that Persico would be moved within the week at a cost of $40,000 and his contact wanted $20,000 up front. Iannuzzi suggested that he could pay the $20,000 and

deduct it from the loanshark monies owed to Agro. Two days later, Persico was moved to Otisville, New York.

NARCOTICS CONSPIRACY
Racketeering Acts 56

(a) Mahlon Steward - The Early Transactions

Mahlon Steward, having spent nearly the entire period between 1948 and 1970 in jail for various armed felony convictions, was released from jail in 1970. In August 1970, he contacted Jack Donnelly, who he characterized as an old friend. According to Steward, Donnelly and "his partner" Dominic Cataldo suggested that they could supply him with one-half kilogram of heroin each time they met. They all agreed that they would be equal partners after expenses.

Steward claimed that from the third week in August until October 1970, he received one-half kilo of heroin on about six occasions from petitioner and Donnelly. He

divided the profits with his partners whenever he accumulated $4,000 to $5,000 in cash.

During the fifth delivery to him, Steward testified that petitioner and Donnelly revealed that part of their profits had to go their crew, which Steward believed was associated with the Colombo Family. He further related that there was conversation about a raging war between rival factions in the Colombo Family and that petitioner backed Junior's side (meaning Carmine Persico).

Steward, in trying to link these drug transactions to the enterprise herein, explained that he received information from Anthony Augello that petitioner was "made" a member of the Colombo Family in the mid 1970's.

Steward was arrested selling heroin to an undercover agent, tried, convicted and sentenced to serve 20 years. After his

release in 1979, he was again arrested for narcotics trafficking in 1981. As a result of this arrest, Steward became a government informant, working undercover for the government against Donnelly.

(b) 1982 Attempts

While acting as an undercover with an undercover DEA agent, Steward testified that he had a number of meetings with Donnelly and Donnelly's partner, Ronnie Sieffert, ultimately resulting in undercover purchase of one-half kilogram of heroin in March 1982. Steward contended that Cataldo was still a partner of Donnelly's but took no part in any of these meetings or transactions. Further, there was absolutely no evidence linking petitioner to this transaction.

Since Steward specifically stated petitioner was not involved in this transaction, the prosecution attempted to link petitioner to the narcotics transactions

post 1982 through testimony of FBI agent Frank Miele.

Miele stated that he was playing an undercover role as a narcotics dealer in South Brooklyn in August 1982. Miele testified that he was dealing with one Frank Balzano who described petitioner as Donnelly's partner, even though Balzano stated petitioner refused to deal with Balzano and that he had never met with, talked to, nor transacted any narcotics business with Cataldo.

Miele, on cross examination as an expert in organized crime conceded that in order for a "made member" to deal in narcotics, it had to be on the sneak, meaning that he could not advise his brethren of his activities.

POINT I

PETITIONER CATALDO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS COUNSEL'S CONFLICT OF INTEREST, AND SUBSEQUENT PHYSICAL AND MENTAL INCAPACITY.

(1) Introduction

It is the contention of petitioner that he was denied the effective assistance of counsel in his defense of this indictment. He bases this contention on two separate but inter-related occurrences during the course of this trial. The first incident occurred relatively early during the trial when it became known the the petitioner and his trial counsel had both become targets of an investigation by the United States Attorney for the Eastern District of New York into judicial corruption in New York State Courts.

It should be noted that prior to the retention of trial counsel herein, trial counsel was under indictment in a federal case pending in the United States District

Court. Petitioner and trial counsel underwent an inquiry as to that circumstance and the appropriate waivers were entered in to the record. However, these waivers only addressed the pending indictment which in no way impacted upon petitioner or involved him.

The second occurrence, rooted in the pressure and tension of the early and on-going conflict of interest, manifested itself by a physical and mental breakdown of trial counsel toward the end of this seven month trial. Petitioner submits that these two incidents taken singularly deprived petitioner of the quality of representation required by the Constitution and taken collectively left petitioner virtually without representation at all.

2. The Factual Predicate

(a) The Trial Court is informed of the Brennan Investigation.

In the Fall of 1985, approximately four

weeks after the opening statements of counsel, petitioner and his attorney became aware that they were targets of a federal inquiry into judicial corruption in Queens County, New York. Petitioner consulted with independent counsel, who on November 22, 1985, brought the potential conflict of interest to the attention of the trial court. During the course of that colloquy, petitioner's trial counsel candidly advised the court of the nature of the ongoing investigation surrounding the then pending case of United States v. Brennan, CR 85-452 [EDNY]. Trial counsel also warned the court that several newspaper articles were about to be published in the various daily papers which would cast counsel and petitioner in an evil light. Petitioner advised the Court that as a result of the exposed investigation and its release to the public, he had lost all contact with his counsel.

The trial court agreed to allow petitioner to discharge trial counsel, but refused to grant a continuance for even one day. The Court should note that the Iannuzzi portion of the case alone called for review of literally hundreds of taped conversations, let alone the other pretrial preparation necessary in a case of this type.

The Brennan case was not only a far reaching probe into judicial corruption of a Justice of the Supreme Court for the State of New York but also a very high profile case with literally daily press coverage, naming petitioner and trial counsel, and several members of petitioner's family being subpoenaed.

(b) Trial Counsel's conflict of interest and the Motion for a Mistrial

On November 27, 1985, petitioner with the aid of independent counsel, moved for an Order granting him a mistrial, or in the

alternative, a severence of the claims against him. In support of this application, petitioner alleged inter alia that he and his trial counsel "may be targets of a grand jury investigation" relating to illegal payments to Hon. William C. Brennan, who was then on trial in the Eastern District of New York. He further claimed that, as a result of the Brennan investigation and trial, he and his trial counsel had become estranged and distrusting of each other. In short, he claimed that trial counsel's pre-occupation with his own problems seriously undermined counsel's ability to provide adequate legal representation to his client.

The government claimed no conflict existed because the "alleged investigation" in the Eastern District was speculative, hypothetical, and "utterly unrelated" to the case on trial. The prosecution further suggested that petitioner's application was a

sham, inasmuch as petitioner had waived his right to assert a conflict with respect to his counsel on two prior occasions. Taking a rather myopic point of view, the government urged that petitioner had failed to demonstrate that the conflict had an adverse effect on his attorney's performance.

To digress for a moment, it is interesting to wonder whether the government would have requested the court to have petitioner exercute a new waiver had petitioner not raised this issue, first.

On December 9, 1985, a hearing and oral argument were held. During the course of the hearing, petitioner's trial counsel testified as to his representation of petitioner, the difficulties caused by the Brennan case, and the resultant total inability to communicate with petitioner. Petitioner requested a two week adjournment of the trial withinwhich to hire new counsel.

The Court requested that the "new" counsel presenting this motion to communicate with the prosecutor of the Brennan case and report back to the Court. Counsel did same and reported that, indeed, petitioner and trial counsel were both targets of the grand jury investigation, they would not be indicted for the time being, and that they would, however, be named during the pending trial of Justice Brennan.

(c) The decision of the Court.

Following the hearing, the court rendered a written opinion denying the motion. The touchstone of the court's opinion was the determination that nothing has been demonstrated to the court which in any way would serve to inhibit effective advocacy by him on petitioner's behalf. Discounting petitioner's claims of estrangement, the court placed significant weight on each of the factors urged by the

government, to wit: that the Brennan trial and investigation was unrelated to the case on trial; that there were prior waivers relating to counsel's then pending indictment; and that the allegations made in petitioner's motions were, in the prosecutor's view, highly speculative.

Upon the rendering of the decision, petitioner requested a two week continuance within which to hire a new attorney. Said request was denied. On December 30, 1985, petitioner moved to reargue on the basis of the trial testimony in the Brennan case. Witnesses therein, particularly one Salvatore Polisi testified about alleged bribes and bribe attempts by petitioner's trial counsel in various matters and one by petitioner himself. Said testimony received wide media coverage.

The trial court summarily denied petitioner's motion without proffers or

hearings.

(d) Trial Counsel's Performance Following the Court's Decision.

The trial proceeded through the winter of 1985-1986 and into the Spring. During the three months following the Court's decision, petitioner's counsel's participation was minimal at best. Despite the fact that his client was named in the RICO conspiracy, etc., and was at least indirectly involved in the incidents described by various witnesses, trial counsel rarely participated. As the court later learned, trial counsel was suffering from severe and ever-increasing hypertension.

In addition, the court learned in April 1986 that the medication administered to trial counsel beginning in January 1986 had been causing "depression and some disorientation." According to counsel's physician, his hypertension was so severe in

April, 1986 as to be called life-threatening.

On March 17, 1986, Mahlon Steward, the prosecution's primary witness against petitioner in connection with the narcotics predicate acts began his testimony. Petitioner was the only one named in this predicate act.

Trial counsel's cross examination proceeded on the afternoon of March 18th and continued into the morning of the 19th. Counsel long known as one of the more effective and aggressive cross examiners in major trials was not himself. He was disorganized and obviously disoriented.

Though Steward had previously testified in seven trials, counsel appeared to be unaware of that fact until well into his cross. On several matters, the questions posed by counsel allowed the witness to merely repeat his direct examination. On other occasions, counsel seemed wholly

unaware of the witness's direct, and was unable to distinguish between what oral and written statements were made by Steward. On still other occasions, he improperly inserted himself as an unsworn witness.

One of the most glaring examples occurred when counsel questioned whether Steward would ever serve a day on the incidents wherein he was arrested in 1970 for heroin distribution to an undercover. This incident was related by Steward to be connected to the transactions claimed by Steward to be part of his dealings with petitioner. Counsel seemed to forget that Steward was convicted for that offense and was sentenced to Twenty years in prison and that this conviction was utilized by the government to corroborate these alleged transactions with petitioner.

This fact was central to the case presented and totally forgotten and

misunderstood by counsel. An attorney of the high calibre of trial counsel would never confuse such evidence and serves as strong evidence of the toll of the presures, ill health and medication taken by counsel.

These and several other instances compounded to effectively deny petitioner a fair trial.

Counsel's inattentiveness, at times verging on incoherence, continued throughout his cross of Agents John Jackson and Frank Miele, witnesses offered to corroborate portions of Steward's narrative. Counsel, hereagain, was clearly confused as to dates, meetings and exhibits in evidence.

(e) Trial Counsel's Physical Collapse.

On April 3, 1986, shortly after he began his cross-examination of Joseph Iannuzzi, trial counsel, during a robing-room conference, informed the court that he was physically unable to continue because of a

"long illness with diverticulitis and a very, very severe case of bleeding hemorrhoids."

On the morning of Friday, April 4th, the Court informed all counsel that petitioner's trial counsel's doctor reported that he was suffering from severe hypertension and probably diabetes. Other counsel informed the assemblage that he learned that the medication that trial counsel was taking was causing depression, high blood pressure and some disorientation. The Court then informed petitioner of the problem and permitted petitioner and counsel to confer over the phone. After this conference petitioner indicated that he declined to proceed without counsel present.

After conferring with counsel's physician, the court indicated that counsel's illness could be viewed as life-threatening but that he probably would be able to return in approximately ten days.

The court decided to appoint a CJA Attorney as a "backup" counsel for petitioner. the case was then adjourned until April 15, 1986.

(f) The Assignment of Michael Hurwitz, Esq. and His Motion for a Mistrial.

On Monday, April 7, 1986, petitioner by his newly appointed counsel Michael Hurwitz, Esq., moved for a mistrial. Hurwitz argued that, given the length and complexity of this case, new counsel could not adequately and competently represent petitioner unless a minimum of thirty days was given counsel to prepare. In response thereto, the court inquired of counsel whether he wished to remain on the CJA Panel. The court reserved decision on the motion and directed the government to submit responsive papers.

The government's response suggested the motion was premature. Relying on United States v. Tramunti, 513 F.2d 1087 (1975), the

prosecution glibly claimed that the ten days afforded by the court were more than sufficient, inasmuch as "new counsel does not have to prepare a six month case for trial; he need only prepare for the very last part of the government's case and review the record in order to prepare his closing argument."

The government naively or better yet disingenuously asserts that this is a minor task easily done in the ten day hiatus. The government merely dismissed the six months this case was on trial. Similarly, the fact that the very witness on the stand, Iannuzzi, was the major witness against petitioner and petitioner's counsel just began his cross examination was discounted. Add to this the literally hundreds of hours of tapes made by Iannuzzi and the mounds of 3500 material including thousands of pages of prior testimony by Iannuzzi. No one in their right

mind could agree to do this let alone presume he could.

On April 14th, Hurwitz reiterated his position that a mistrial and severence be should granted. He based his argument, in large measure, on the length and complexity of the case and the enormous task of preparing for what was to come -- the continued cross of Iannuzzi, the defense case and summation. The court, in a written opinion and order, denied petitioner's motion and directed Hurwitz to act as backup counsel to petitioner's trial counsel.

It should be noted at this point that the issue of judicial economy or any consideration that a severence would cause a second, lengthy trial for petitioner alone was totally negated by the fact that already one co-defendant, Dominick Montemarano, was previously severed and his trial was to follow. That case involved the same

predicate acts herein, to wit: the bribery of prison officials in the so called Iannuzzi conspiracy. The other predicate acts for petitioner consumed only a couple of days of testimony coupled with the prior judgment of conviction in the Annacharico matter.

On April 15th all counsel and defendants appeared as ordered. Trial counsel then informed the court that he did not believe he was mentally up to proceeding. Trial counsel further conceded that, because of his own problems (the new investigation and the like), his depression, and perhaps improper medication, he had failed to give petitioner adequate representation. The court responded by suggesting that counsel was merely making a record and ordered him to proceed.

Despite the fact that his illness occurred during his unfinished cross examination, and his being present with backup counsel, petitioner's counsel did not

further examine witness Iannuzzi nor did either counsel significantly contribute during the remainder of the trial. Trial counsel did give a closing statement. That argument was characterized as incomplete and disjointed, fraught with mistakes and generally ineffective.

Trial counsel did not appear at petitioner's sentence hearings and the court was advised by petitioner that, trial counsel was very sick after the trial. He further stated, "He almost died in the hospital, Your Honor, and he hasn't been in court since then. Assigned counsel Hurwitz then advised the court that it was his belief that trial counsel was no longer practicing law.

3. The Applicable Law.

The Sixth Amendment guarantees the right of the accused to have "assistance of counsel for his defence." Though the earlier cases are concerned with the accused's basic right

to counsel, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963), the more recent cases have shifted in focus from the issue of the "right to counsel" to the more problematic notion of the "effective assistance of counsel." See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984). Strickland and its predecessors teach that the concept of "effective assistance of counsel" represents an inter-relationship between the Sixth Amendment's right to counsel and the Fifth Amendment's guarantee of a fair trial. As a result of this inter-relationship, the Sixth Amendment's guarantee of effective assistance of counsel has given rise to two correlative rights: the right to counsel of reasonable competence, McCann v. Richardson, 397 U.S. 759, 770-71 (1970); and the right to counsel's undivided loyalty, Wood v.

Georgia, 450 U.S. 261, 101 S.Ct. 1097, 1103 (1981). See Strickland , supra, 104 S.Ct. at 2065. Though the Court in Strickland urged the courts to differentiate between counsel's duty to perform competently and counsel's duty to avoid conflicts of interest, the case at bar is unusual because it contains a convergence of the two correlative rights.

It is petitioner's position that his counsel's initial conflict of interest, unresolved throughout the trial, led to a total breakdown of his attorney's ability to function physically and mentally as a trial advocate. Petitioner further contends that the trial court's assignment of "backup" counsel, more than seven months into the trial, in an attempt to cure the dilemma presented, does not pass constitutional muster.

Though most conflicts of interest arise in the context of counsel who engage in

multiple representation of co-defendants, Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980), Hollaway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978), and United States v. Curcio, 680 F.2d 881 (2nd Cir. 1985), or where counsel has previously represented prosecution witnesses or co-defendants. See United States v. Iorizzo, 786 F.2d 52 (2nd Cir. 1986). Similarly, as in this case, a conflict of interest sometimes arises where there is a conflict between the client and the attorney's personal interests. See United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984); Briguglio v. United States, (3rd Cir. 1982); Government of the Virgin Islands v. Zepp, 748 F.2d 125 (3rd Cir. 1984); and Solina v. United States, 709 F.2d 160 (2nd Cir. 1983).

Indeed, the New York State Code of Professional Responsibility provides, inter alia that:

> "the professional judgment of a lawyer should be exercized within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. N.Y.S. Prof. Resp. Eth. Consid. §5.1, emphasis supplied).

See also D.R. 5-101, indicating that an attorney should not accept employment if representation pursuant to that employment may be affected by the attorney's personal interests.

The conflict of interest in this case between petitioner and trial counsel is obvious and severe.

At the very beginning of the case there was a procedure employed at the behest of the governement wherein they wanted a waiver of a potential conflict of interest as a result of trial counsel being under indictment in the Eastern District of New York. It seemed

important to have this waiver memorialized on the record and to clear the air that trial counsel's attention may be distracted by his "problem." The government insisted that this waiver be entered so as to not allow a future claim by petitioner. The waiver was entered.

At trial, after the court received notice of the palpable conflict, not only dealing with a potential conflict between the parties themselves but also the extreme pressure of being named as a person who was being investigated and named as a judicial "fixer."

The court conducted a hearing pursuant to the suggestions in United States v. Alberti, 470 F.2d 878 (2nd Cir. 1972), and United States v. Bernstein, 533 F.2d 775 (2nd Cir. 1976). Following the hearing, the court characterized the conflict as speculative. It characterized counsel's espoused conflict as "testimony to the effect that he would

prefer not to proceed amounts to no more than expression of his desire." This conclusion is clearly erroneous in view of counsel's unchallenged statements that he could not adequately represent petitioner; that he and petitioner had reached a total impasse as a result of the Brennan case; that "Dominic [Cataldo] has every right in the world to believe that maybe I am trying to save myself or get information and maybe use it against him. I hope he doesn't believe that, but he has every right in the world to feel that I might be looking to curry favor to save myself at his expense."

The interlocking relationships between petitioner and trial counsel created a serious conflict of interest between them. See United States v. Cancilla, supra; and Briguglio v. United States, supra.

The precise nature of trial counsel's alleged involvement in the Brennan case was

that of an alleged corruptor of the judicial system in cases in which he represented petitioner and petitioner's alleged co-conspirator, Jack Donnelly. From these circumstances, an actual conflict arose. Trial counsel had a personal interest in defending himself against the charges then flowing from an ongoing investigation, unknown to anyone when this trial commenced. Additionally, what amount of additional pressure was attendant by his having had the added distractions of new, far reaching and widely publicized allegations of wrong-doing.

Clearly counsel was in an untenable position -- he was forced to represent an individual with whom he might become a co-defendant in another case actively under investigation. Finally, it is hard to imagine how counsel, already facing one federal indictment could have continued to focus on the needs of his client while facing

these new allegations, new investigations, and possible new indictments.

The prosecution in its ultimate wisdom argued in the District Court and the Court of Appeals at some length that inasmuch as petitioner had waived a possible conflict earlier that this new revelation was merely an attempt to remove himself from the trial. The absurdity of this position is clear.

Petitioner could have easily believed that the single "problem" would be no impediment to his counsel properly and vigorously defending him. However, as counsel's difficulties began to multiply, petitioner certainly should not be bound by his prior waiver nor be denied the opportunity to reassess the situation and, quite reasonably, arrive at a conclusion that things had progressed to a point that their relationship was no longer viable and these conflicts precluded reliance on counsel as

his attorney.

In Briguglio v. United States, supra, trial counsel, as here, unbeknownst to the defendant, was under investigation and later plead guilty to a crime unrelated to defendant's criminal activity. The Court of Appeals remanded for a hearing to determine to what extent counsel's behavior was affected by his outside problem.

In United States v. Cancilla, supra, after defendant was indicted for insurance fraud, the government advised the court that defendant's counsel may have been involved in criminal activity similar to that of the defendant's. The Court of Appeals held that a personal conflict of interest of this sort automatically required reversal of the conviction.

This case here presents facts which appear to be a cross between Cancilla and Briguglio. Here, counsel was implicated

seriously in an unrelated case, involving criminal conduct. Even asuming arguendo that the facts herein do not rise to the level of automatic reversal, they do establish a clear conflict of interest which manifested itself in more severe and adverse effects as the trial progressed.

Shortly after the court's decision which found no conflict, trial counsel, in January, began to suffer from extremely high blood pressure. To counteract this physical problem, trial counsel was apparently medicated with a drug which brought on depression and disorientation. How much this situation was brought out by the growing problems, allegations and vast media attention, given the Brennan case and counsel's name being bantered around as being a corrupt lawyer, we can only imagine; then combine it with the now difficult adverse relationship between petitioner and counsel

and the normal pressure attendant with these megatrials, it hard to believe that anyone let alone the government could believe there was no cause for alarm.

This entire situation and the medication led to counsel's collapse during the cross examination of the government's witness in chief against petitioner.

Surely, one is hard pressed to demonstrate a clearer picture of what can result when an attorney who is concerned about his independent conduct, is forced to continue to represent a client whose interests may be diametrically opposed to his own. In short, we submit that there can be no doubt that the unresolved conflict of December led to counsel's collapse in April.

Following counsel's inability to continue and guided by United States v. Tramunti, supra, the court appointed backup counsel and adjourned the case for ten days.

This remedy was far too little and much to late.

In Tramunti, supra, two weeks after the commencement of a complex narcotics conspiracy case, defendant's attorney died. The following day, a new attorney was appointed, and the trial resumed one day later. Counsel moved for a four day continuance which was denied. The Court of Appeals found that under the circumstances present, the trial court abused its discretion in failing to grant a continuance because counsel had insufficient time to prepare. See United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963) (two week continuance sufficient prior to the start of a three-month trial).

If one juxtaposes the facts of Tramunti and Bentvena with those present here, the conclusion becomes inescapable that a mistrial or alternatively, a 30 day

continuance hould have been granted. Here the court was faced with an extremely complex, multi-defendant, multi-tiered, multi-faceted case. Here, the trial was already in progress six months when counsel collapsed. The court's belief that newly appointed counsel could master the complexities of what transpired and what was about to occur, including picking up in the middle of counsel's cross of the very experienced Iannuzzi, is sheer fantasy. See United States v. Mitchell, 354 F.2d 767, 769 (2nd Cir. 1966); United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978) and cases cited therein. United States v. Mardian, 546 F.2d 973 (D.C. Cir. en banc, 1976).

Moreover, the court's attempt to bully appointed counsel into taking the assignment without a continuance was highly improper. The District Court's desire for expedition can furnish no justification for the

subversion of the Sixth Amendment right to present an effective defense through counsel competent to proceed.

Especially, in view of the fact that an already severed co-defendant was to have the Iannuzzi portion of the case retried later, there is no excuse for forcing petitioner to continue effectively without counsel.

POINT II

THE COURT ERRED BY AMENDING THE INDICTMENT TO INCLUDE A PREDICATE ACT WHICH WAS NOT SUBMITTED TO THE GRAND JURY.

Racketeering Act 56 of this indictment charged as follows:

> It was part of the pattern of racketeering activity that on or about the dates specified below,...the defendant DOMINIC CATALDO ... and others to the Grand Jury known and unknown, unlawfully, wilfully, and knowingly did engage in the felonious buying, selling, and otherwise dealing in narcotic and other dangerous drugs in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846:
>
> a. From in or about August of 1970, up to and including on or about October 27, 1970, the defendant, DOMINIC

> CATALDO, ... and others to the Grand Jury known and unknown, unlawfully, intentionally, and knowingly did combine, conspire, confederate, and agree together and with each other to distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, heroin, the exact amount thereof being to the Grand Jury unknown, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846.
>
> b. From in or about August of 1970, up to and including on or about October 27, 1970, the defendant, DOMINIC CATALDO, ... and others to the Grand Jury known and unknown, unlawfully, intentionally, and knowingly did on approximately six occasions distribute a Schedule I narcotic drug controlled substance, to wit, a total of approximately three kilograms of heroin and diluents, in violation of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A).

The sections charged in the indictment, §§812, 841(a)(1), 841(b)(1)(A), and 846 did not, however, become effective until May 1, 1971, eight to ten months after the narcotics violations allegedly occurred. At the time the crimes were allegedly committed, there was no comparable federal crime. The only appropriate federal statute in existence was

21 U.S.C. §§173 and 174, which requires proof, unlike §§841 and 846, of importation or knowledge of importation of the alleged narcotics into the United States. Under that law, knowledge of importation is an essential element of the offense, and, according to the presumption of regularity, it must be assumed that the Grand Jury was appropriately charged despite the incorrect statute citation in the indictment. No evidence of importation was introduced at trial and petitioner appropriately moved for judgment of acquittal pursuant to Fed.R.Crim.P. 29 at the close of the prosecution's case. Not only was this motion denied, but the court struck all references to any federal statute in the superseding indictment and charged the jury on the basis of New York State Law, rather than on the federal law as it existed in 1970.

Since the New York State Law did not

include proof of knowledge of importation, the court impermissibly amended the indictment, as we must assume it was rendered by the Grand Jury, in violation of petitioner's rights under the Fifth Amendment. Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969).

In Ex Parte Bain, 121 U.S. 1 (1887), the Supreme Court enunciated the rule regarding amendments to an indictment. Bain held that, once the grand jury has returned an indictment, its charges may not be broadened unless done so by the grand jury itself. The rationale for this ruling is found in the Fifth Amendment's requirement that an indictment "for a capital or otherwise infamous crime" be brought by the grand jury. The court in Bain, stressed the importance of the grand jury's constitutional function of safeguarding citizens against arbitrary and oppressive actions by the court or

prosecutor. The prohibition against amendment of an indictment except upon resubmission to the grand jury, protects the accused from being convicted "on the basis of facts not found by, and perhaps not even presented to the grand jury which indicted him." Russell v. United States, 369 U.S. 749, 770 (1962). United States v. Silverman, 430 F.2d 106, 110 (2nd Cir. 1970), modified on other grounds, 439 F.2d 1198 (2nd Cir. 1970). To allow a prosecutor or the court to amend an indictment at will demeans the function and integrity of the grand jury process.

Bain is still the controlling law on the subject of broadening indictments through amendment. See, e.g., United States v. Norris, 281 U.S. 619, 622 (1930) (concurrence of grand jury is needed to add to indictment); Russell v. United States, supra, 369 U.S. at 770 (except as to matters

of form, an indictment may not be amended unless it is resubmitted to the grand jury).

Two cases subsequent to Bain have modified the rule only slightly. In Stirone v. United States, 361 U.S. 212 (1960), the Supreme Court followed Bain and concluded "that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." 361 U.S. at 217. Moreover, Stirone, clarified the distinction between those indictments which are amended and those which are at variance with the proof at trial.

According to Stirone, the determination of what constitutes an amendment requiring per se reversal hinges on the nature of the alleged constitutional violation. Where the variation changes an essential element of the crime, in derogation of the defendant's Fifth Amendment right to presentment, the court deems it "too serious to be treated as

nothing more than a variance," and construes it to be a constructive amendment. 361 U.S. at 217-18. This is distinguished from an alleged Fifth Amendment violation of the proper notice or specificity requirements which are subject to a more liberal reversal rule.

In United States v. Miller, ___ U.S. ___, 105 S.Ct. 1811 (1985), the Supreme Court limited the Bain rule only to the extent that the narrowing of an indictment or the striking of surplusage may no longer be considered an unconstitutional amendment. The Court ultimately reaffirmed the general proposition set out in Bain that a conviction is rendered void when based on an offense different from that charged in the grand jury's indictment.

Applying the principles of Bain, Stirone, and Miller to the case at bar, it is clear that petitioner was denied his Fifth

Amendment right to presentment by the District Court's amendment. By charging the jury on New York State Law, which omits the essential element of importation, the judge constructively amended the indictment, eliminating an essential element of the offense charged by the grand jury.

This is no ministerial act but was an overt attempt to correct the mistake of the prosecution in presenting its case to the jury by leaving out an essential element of the federal crime alleged.

Moreover, the New York State Law as charged to the jury and 21 U.S.C. §§173 and 174 cannot be considered the same crime, since their respective elements are not identical. Therefore, the judge's charge broadened the scope of the original indictment by permitting conviction for acts other than those specified in the indictment. By allowing the jury to convict under state

law, the judge completely bypassed the grand jury function and allowed petitioner to be convicted for a crime for which he was never indicted.

The per se reversal rule due to amendment enunciated by the Supreme Court in Bain dictates that petitioner's conviction on predicate acts 34(a) and 34(b) must be overturned. The Court should note that these numbers correspond to the edited and renumbered indictment presented to the jury that appeared as Racketeering acts 56(a) and (b) in the superseding indictment.

Even under a more liberal view of reversal, which requires a showing that an "essential" or "material" element was changed to petitioner's prejudice, petitioner's conviction must still be overturned. Clearly the substitution of one crime for another with the resultant denial of his Fifth Amendment Right to presentment satisfies even

the looser standard.

The government proceeded on federal law throughout its case, then when it became apparent that they failed to introduce any evidence of an essential element, the court came to the rescue and threw out the federal statutes and substituted state law to correct the fatal flaw in the government's proof.

It is therefore submitted that the greatest interest of preserving the integrity of the Grand Jury and protecting an accused from conviction on facts not found by or presentment to a Grand Jury must prevail here. Under the Fifth Amendment to the Constitution, petitioner's convictions for these predicate acts must be overturned and dismissed.

POINT III

PETITIONER, DOMINIC CATALDO ADOPTS THE POINTS PUT FORWARD IN THE PETITIONS OF CARMINE PERSICO, ALPHONSE PERSICO, JOHN DeROSS AND ANTHONY SCARPATI IN #87-1323.

DOMINIC CATALDO SPECIFICALLY ADOPTS POINTS I, II & IV IN THE ALPHONSE PERSICO, ET AL. PETITION AND POINTS I, II, III, & IV OF THE CARMINE PERSICO PETITION.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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No. 87-1553

In the Supreme Court of the United States

OCTOBER TERM, 1987

DOMINIC CATALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment.

2. Whether petitioner was prejudiced by an erroneous statutory citation in the indictment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (87-1314 Pet. App. 1a-38a) is reported at 832 F.2d 705. The opinions of the district court are reported at 646 F. Supp. 752 and 625 F. Supp. 1255.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1987. Orders denying petitions for rehearing in this case were entered on December 9 (87-1314 Pet. App. 39a-40a) and December 11, 1987 (87-6597 Pet. App. B). The petition for a writ of certiorari was filed on March 17, 1988, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was a co-defendant with the petitioners in *United States* v. *Persico,* 832 F.2d 705 (2d Cir. 1987), petitions for cert. pending, Nos. 87-1314, 87-1323, 87-1324, and 87-6597. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to conduct and participate in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1), and the substantive crime of conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2). He was sentenced to a total of 14 years' imprisonment.

1. Eight weeks into the trial of this multi-defendant case, petitioner moved for a mistrial or a severance, claiming that a potential conflict of interest had arisen between him and his counsel, Michael Coiro. The alleged conflict related to the July 26, 1985, indictment of New York State Supreme Court Justice William C. Brennan on federal corruption charges. See *United States* v. *Brennan,* 629 F. Supp. 283, 291 (E.D.N.Y.), aff'd, 798 F.2d 581 (2d Cir. 1986). Petitioner claimed that approximately two weeks earlier he and Coiro had learned that their names had surfaced in an Eastern District of New York investigation as persons who may have paid bribes to Justice Brennan. Petitioner asserted that, as a result, he was refusing to discuss the Brennan matter with Coiro and that he and Coiro could no longer communicate. 625 F. Supp. at 1256.

Following a hearing at which petitioner was represented by separate counsel, the district court denied the motion. The court noted (625 F. Supp. at 1258) that there was a "total lack of connection between the facts of this case and the alleged incidents involving Justice Brennan." More-

over, the court stated (*id.* at 1259), petitioner's concern that he or Coiro would be indicted in connection with that case was supported by nothing more than "rumors and speculation." Indeed, the affidavit of petitioner's new counsel revealed that he was informed by the prosecutor in the *Brennan* case " 'that no charges would be brought [against Mr. Cataldo or Mr. Coiro] in the foreseeable future' " (*id.* at 1258). The court accordingly concluded that "[n]othing has been demonstrated to the Court which in any way would serve to inhibit effective advocacy by [Coiro] on [petitioner's] behalf" (*id.* at 1257).

The district court further noted (625 F. Supp. at 1258) that "[t]here is no need for [petitioner] and Mr. Coiro to confer about any of the Brennan situations insofar as the defense to the instant charges is concerned." The court rejected (*ibid.*) petitioner's assertion that Coiro might sacrifice petitioner to please the prosecutors in another district. In that regard, the court noted (*id.* at 1258-1259) that at the time of petitioner's initial arraignment, 11 months earlier, Coiro was already under federal indictment for racketeering and obstruction of justice in a narcotics case in the Eastern District of New York. On the government's application, petitioner and Coiro had appeared before the district court, and petitioner was fully and carefully advised of the risks of proceeding with Coiro as his counsel. Petitioner nevertheless voluntarily and knowingly waived his right to object to any conflict arising from the fact that Coiro was a defendant in another federal case. 625 F. Supp. at 1257-1259. While it did not hold that petitioner's prior waiver extended to the *Brennan* matter, the district court found (*id.* at 1258-1259) that petitioner's willingness to make that waiver in order to keep Coiro as counsel contradicted petitioner's new assertions of a conflict and reduced the risk that an actual con-

flict of interest had developed. The district court stated in conclusion (*id.* at 1259) that petitioner was free to continue the trial with his new lawyer, either with or without the assistance of Coiro, but that the trial would not be delayed on his account.

2. The trial continued with Coiro as sole counsel for petitioner. Several months later, when the government's direct case was nearly complete, Coiro became ill. Coiro's treating physician informed the district court that Coiro would be ready to proceed with the trial after approximately ten days (Tr. 12,695; C.A. App. 600). Accordingly, the district court adjourned the trial for 11 days. The court also appointed another lawyer, Michael Hurwitz, as back-up counsel for petitioner in the event that Coiro ultimately was unable to return (Tr. 12,725; C.A. App. 627). The government gave Hurwitz copies of the relevant tape transcripts and Jencks Act material (see 18 U.S.C. 3500), and the court made the trial transcript available to him so that he could prepare to finish the trial if Coiro were unable to do so (Tr. 12,696, 12,723; C.A. App. 601, 624).

When Coiro returned to court at the end of the adjournment, he announced that he was "not up to [resuming the trial] mentally," and that "[a]s far as [he was] concerned, [petitioner] didn't have the adequate representation he should have" (Tr. 12,750; C.A. App. 652). The district court concluded that Coiro was "just making a record" for his client (Tr. 12,751; C.A. App. 653), and ordered Coiro to be in court, either to represent petitioner or to confer with and assist Hurwitz in representing petitioner (Tr. 12,751; C.A. App. 681). The court also denied, in a written opinion, a motion by Hurwitz for a continuance or a severance (C.A. App. 678-682). The trial concluded with Coiro and Hurwitz jointly representing petitioner.

3. On appeal, petitioner argued, inter alia, that he was denied the effective assistance of counsel as a result of

Coiro's conflict of interest and as a result of Coiro's illness. The court of appeals did not separately discuss that claim, but simply grouped that claim with others that it found to be without merit (87-1314 Pet. App. 29a).

ARGUMENT

Petitioner expressly incorporates (Pet. 63) most of the claims of petitioners Carmine Persico, Alphonse Persico, John DeRoss, and Anthony Scarpati. We have responded to those contentions in our brief in opposition in Nos. 87-1314, 87-1323, 87-1324, and 87-6597, and we rely on our response there in this case as well.[1]

1. Petitioner renews his claim (Pet. 22-53) that he was denied the effective assistance of counsel both because of a conflict of interest between himself and his trial counsel and because his counsel's performance at trial was constitutionally deficient as a result of counsel's illness. Petitioner, however, has completely failed to show either "that his counsel actively represented conflicting interests" or that such a conflict "adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). He has also failed, under the more stringent standards of *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984), to demonstrate that his counsel's performance fell measurably below "prevailing professional norms" or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In any event, such factbound claims do not warrant review by this Court.

a. The district court concluded (625 F. Supp. at 1258), after a careful analysis of the facts of this case, that peti-

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[1] We have provided a copy of our brief in opposition in Nos. 87-1314, 87-1323, 87-1324, and 87-6597 to counsel for petitioner in this case.

tioner's and Coiro's alleged exposure in the *Brennan* bribery scheme was "at best speculative." The district court found (*ibid.*) that at the time of petitioner's trial no indictment was reasonably foreseeable. Furthermore, the *Brennan* case was entirely unrelated to this case, and the court properly concluded (*ibid.*) that Coiro's potential involvement in the *Brennan* case would not have any impact on petitioner's defense. Unlike *United States* v. *Cancilla,* 725 F.2d 867 (2d Cir. 1984), on which petitioner mistakenly relies (Pet. 48), there were no government witnesses in this trial whom Coiro might have declined to cross-examine out of fear that vigorous questioning would expose Coiro's own wrongdoing. If a potential conflict of interest ever were to arise, it would be in a possible future prosecution related to the *Brennan* case, not here.[2]

Petitioner had already waived a more serious potential conflict arising out of a case in which Coiro had actually been indicted. As the district court noted (625 F. Supp. at 1259), that waiver undermined petitioner's later claim that, based on a wholly speculative prosecution, petitioner harbored concern that Coiro might sacrifice petitioner in the instant case to curry favor with the prosecutors from another district. Under these circumstances, the district court properly took note of the danger that petitioner was trying to capitalize on a "newly discovered" conflict to seek a severance to which he otherwise was not entitled (*id.* at 1256-1257). Furthermore, even if petitioner could establish an actual conflict of interest, he is unable to identify any adverse effect resulting from Coiro's representa-

[2] Since the cases were unrelated, Coiro would have had no opportunity to use his preparation and trial of the *Persico* case to obtain confidential information from petitioner about the *Brennan* case to use against petitioner. Indeed, because petitioner was fully aware of the potential conflict and had retained independent counsel to advise him about it, he was in an ideal position to protect himself from that possibility by refusing to discuss the *Brennan* matter with Coiro.

tion of him. Indeed, petitioner fails even to allege any defaults in advocacy caused by Coiro's alleged conflict.

b. Petitioner also fails, more generally, to substantiate his claim that Coiro provided ineffective assistance due to his illness. To overcome the strong presumption that Coiro's performance was adequate, petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. at 687. Combing nearly 18,000 pages of trial transcript, however, petitioner can do no more than isolate a few places where counsel allegedly got a date wrong or where a traditional cross-examination technique failed to pay dividends (Pet. 31-33). Furthermore, even if petitioner's unsupported allegation that Coiro's performance was deficient could satisfy *Strickland*'s first prong, he fails to satisfy the second by proving that, but for counsel's errors, he might have been acquitted. Petitioner does not even suggest that Coiro's representation in any way "undermines the reliability of the result of the proceeding." *Strickland* v. *Washington*, 466 U.S. at 693.

2. Two of the racketeering acts in Counts 1 and 2 of the superseding indictment (Acts 34(a) and 34(b) of the redacted indictment) charged petitioner with conspiring to distribute and with distributing large quantities of heroin as part of the pattern of racketeering activity through which he participated in the conduct of the affairs of the Colombo Family (C.A. App. 207-208). The original charging language of those racketeering acts, which is set out in the margin,[3] fully apprised him of the nature and

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[3] Racketeering Act # 56[34]:

Dealing In Narcotics

It was a part of the pattern of racketeering activity that, on or about the dates specified below, in the Southern District of New

elements of the offenses charged, including the type and amounts of narcotics involved and the time periods.

At the very end of the charging paragraphs in the two racketeering acts, the indictment erroneously cited Title 21, United States Code, Sections 812, 841, and 846 as the statutes that petitioner's drug dealing had violated. Those provisions of law are codified sections of the 1970 Controlled Substances Act, 21 U.S.C. (1970 ed. & Supp. V) 801 *et seq.*, which was not in effect at the time the charged offenses occurred. The corresponding federal narcotics laws in force at the time, 21 U.S.C. (1964 ed.) 173 and 174,

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York and elsewhere, the defendant, DOMINIC CATALDO, a/k/a "Little Dom," and others to the Grand Jury known and unknown, unlawfully, willfully, and knowingly did engage in the felonious buying and selling of, and otherwise dealing in, narcotics and other dangerous drugs in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846:

a. From in or about August of 1970 up to and including on or about October 27, 1970, the defendant DOMINIC CATALDO, a/k/a "Little Dom," and others to the Grand Jury known and unknown, unlawfully, intentionally, and knowingly did combine, conspire, confederate, and agree together and with each other to distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, heroin, the exact amount thereof being to the Grand Jury unknown, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846.

b. From in or about August of 1970, up to and including on or about October 27, 1970, the defendant DOMINIC CATALDO, a/k/a "Little Dom," and others to the Grand Jury known and unknown, unlawfully, intentionally, and knowingly did on approximately six separate occasions distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, a total of approximately three kilograms of heroin and diluents, in violation of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A).

required the government to prove that the narcotics in issue had been imported and that the defendant knew it. See *Turner* v. *United States*, 396 U.S. 398 (1970) (upholding use of presumption to supply proof of importation and knowledge of importation of heroin). Importation, however, was neither pleaded in the indictment nor proved at trial.

At the close of the government's direct case, petitioner brought the error in citation to the attention of the district court and the government when he moved for a judgment of acquittal with respect to the narcotics racketeering acts for failure to prove importation (Tr. 14,950 *et seq.*). The district court denied the motion, struck the erroneous citations from the indictment, and instructed the jury on the elements of the corresponding drug laws of the State of New York that were in force in 1970. Petitioner now claims (Pet. 53-62) that he was misled into defending against a charge that was not pleaded in the indictment. This contention is without merit.

As this Court has frequently noted, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Furthermore, the Court has explained, "[i]n order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute." *United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941). See also *Williams* v. *United States*, 168 U.S. 382, 389 (1897) (immaterial which statute was orig-

inally contemplated by prosecutor if charges made are embraced "by some statute in force"). A conviction should be reversed only if the error or omission in the statutory citation misled the defendant to his prejudice. Fed. R. Crim. P. 7(c)(3).

Petitioner contends that the statute under which he was charged was the prior federal statute, 21 U.S.C. (1964 ed.) 173 and 174, and that the erroneous citation to the later-enacted statute misled him to his prejudice. RICO, however, recognizes as predicate crimes two categories of narcotics offenses: those chargeable under state law and punishable by more than a year in prison, 18 U.S.C. (& Supp. IV) 1961(1)(A), and those punishable under any law of the United States, 18 U.S.C. (& Supp. IV) 1961(1)(D). The New York State narcotics law on which the district court instructed the jury is squarely within the first category. It also is fully described by the charging language in the racketeering acts in issue. Thus, the crime with which petitioner was charged satisfies both the requirements of RICO and the rule of *Williams* v. *United States, supra*, that the charges be embraced "by some statute in force." Petitioner's purported reliance on the prior federal statute, which was never cited or referred to and the importation elements of which were never pleaded, simply ignores these settled principles.

Nor can petitioner in any way demonstrate prejudice from the citation error. He implies (Pet. 54-55), without explanation, that his defense to the narcotics charges was predicated on the importation element of the unspoken statute. But nothing in the indictment remotely suggested that the prior Sections 173 and 174 applied, and petitioner could not have been surprised, misled, or prejudiced by the government's failure to prove an element which nowhere was pleaded in the indictment. In fact, at trial petitioner took precisely the opposite position, claiming

that the government could not invoke the prior federal statute because it had not been cited in the indictment (Tr. 14,959-14,960).

Petitioner's reliance (Pet. 58) on *Stirone* v. *United States*, 361 U.S. 212 (1960), and related cases is completely misplaced. In *Stirone*, the indictment charged the defendant with extortion for interfering with the importation of sand, but the proof at trial and the charge to the jury permitted conviction for interfering with the importation of sand or the exportation of steel. If the jury had convicted the defendant for obstructing the exportation of the steel, he would have been convicted of a crime not pleaded and found by a grand jury. That concern has no application here. The government proved at trial the precise charges that are described in Racketeering Act 34 of the redacted indictment. Only the citation, which is mere surplusage, was changed. Far from changing an essential element of the offense charged, the government was entirely faithful to it.[4]

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[4] In *United States* v. *Groff*, 643 F.2d 396 (6th Cir.), cert. denied, 454 U.S. 828 (1981), a RICO indictment alleged the commission of predicate crimes under specific sections of the laws of the State of Michigan, but the proof demonstrated violations of Ohio state law. Relying on *Williams* v. *United States*, 168 U.S. at 389, and Fed. R. Crim. P. 7(c)(3), the Sixth Circuit found that the charging language made out the elements of the uncharged Ohio statutes and fully informed the defendant of the offenses charged. Accordingly, it affirmed Groff's conviction. The same principles apply here.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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